Introduction

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Surveys of the creative sector repeatedly demonstrate that innovators regard trade secrecy as one of their most important information management strategies. Surprisingly, however, there has been relatively little academic writing in this area. The reasons why are telling, for they shed light on the issues with which the chapters in this volume deal.

The absence of a deep literature may, in fact, be overdetermined. Thus, one reason for the absence of a robust scholarship is that the legal landscape is difficult to evaluate. The major intellectual property regimes (patent, trademark and copyright law) are based on federal statutes, making both the legislation and case law easy to collect, survey, and categorize. But because trade secrecy is largely a creature of state law (and until recently, mostly state common law), it is less available as a target for doctrinal analysis. Nor is trade secrecy appealing to empiricists. After all, the hallmark of the legal strategy is secrecy. Thus there is little data with which to work: there are no registries of trade secrets and few available indicators of their economic significance. In contrast, the patent system gives economists and lawyers a vast trove of information to study.

Even more importantly, trade secrecy lacks a central theoretical organizing principle. In a sense, trade secrecy functions as an umbrella covering a variety of distinct concerns. Promoting honest business practices is one clear theme. Other concerns involve the relationships between a firm and its employees, commercial partners, and customers. Still others are animated by interests in promoting efficient investment in research and development, human capital, and security. Because it is an umbrella concept, trade secrecy lies at the intersection of many legal doctrines, among others, labor and employment law, torts, contracts, and criminal law.

The plethora of legal regimes, lack of theoretical clarity, and paucity of scholarship and empirical data make it hard for lawmakers to grapple with many of the central questions of trade secrecy law. Open issues include the types of information that fall under trade secrecy protection, the degree to which the information must be kept secret, the respective rights of parties with access to the information, the appropriate measures and types of relief, and the relationship between trade secrecy and other intellectual property laws.

The murkiness of trade secrecy doctrine also makes it difficult to balance the interest in trade secrecy against other societal values. In particular, there are many contexts in which openness is crucial. Sharing is critical to collaborative and cumulative research. Information flow is the basis of a competitive economy. Democratic governance requires a vibrant marketplace of ideas and a degree of transparency regarding critical platform technologies, such as voting machines and search engines. Some social problems are so large that they require the efforts of multiple parties, and therefore broad access to key information. Forging domestic law that takes all of these interests into account is no easy task. International lawmaking is equally affected. Trade secrecy has been the subject of both bilateral and multilateral negotiation efforts, but the premier international intellectual property instrument – the TRIPS Agreement – treats trade secrecy in only one, rather vague, provision and fails to fully account for important categories of secrets, such as traditional knowledge and regulatory data.

The chapters in this book begin to address these issues. Drafts of the chapters were presented at a workshop attended by the authors and a number of commentators. The chapters provoked a lively discussion highlighting the problematic nature of the trade secrecy regime, but also clarifying the sources of those difficulties and illuminating the policy options. We hope the resulting volume, which reflects that conversation, will act as a springboard for further scholarship in this critical area.